CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 33

THE UNITED STATES OF AMERICA, PETITIONER

vs.

THE STATE OF CALIFORNIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 27, 1935

CERTIORARI GRANTED OCTOBER 14, 1935

No. 7436

United States

Circuit Court of Appeals

For the Ninth Circuit.

THE STATE OF CALIFORNIA,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Parker Printing Company, 545 Sansome Street, San Francisco.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 33

THE UNITED STATES OF AMERICA, PETITIONER

vs.

THE STATE OF CALIFORNIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

INDEX

	Page
Record from D. C. U. S., Northern California	1
Complaint	2
Summons and marshal's return	4
Special appearance and demurrer	6
Order overruling demurrer	7
Answer	7
Defendant's motion for judgment	13
Order on motions for judgment	14
Judgment	15
Defendant's exceptions to judgment, etc	16
Stipulations and orders extending time	17
Bill of exceptions	20
Caption	20
Waiver of jury and stipulation of facts	20
Defendant's motion for judgment	30
Stipulation as to bill of exceptions	32
Order settling bill of exceptions	34
Exhibit "A"—Map showing tracks of The Belt and its various connections	34-A
Petition for appeal	35
Assignments of error	36
Order allowing appeal, etc	39
Bond on appeal	41
Praecipe for transcript of record	43
Stipulation re amendment of praecipe, etc	45
Clerk's certificate	47
Citation and service	48
Proceedings in U. S. C. C. A., Ninth Circuit	50
Caption	50
Order of submission	50
Order directing filing of opinion and judgment	50
Opinion, Wilbur, J	51
Judgment	56
Clerk's certificate	57
Order allowing certiorari	58

NAMES AND ADDRESSES OF ATTORNEYS

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MORRIS R. CLARK,
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M. C. LIST,
Washington, D. C.
Attorneys for Appellee.

In the District Court of the United States for the Northern District of California, Southern Division.

No. 19246-S

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

THE STATE OF CALIFORNIA,
Defendant.

COMPLAINT

Now comes the United States of America, by Geo. J. Hatfield, United States Attorney for the Northern District of California, and brings this action on behalf of the United States against the State of California, operating what is known as the State Belt Railroad through a Board of State Harbor Commissioners consisting of P. W. Meherin, J. J. Tynan, and Jos. A. Moore, and having an office and place of business at San Francisco in the State of California; this action being brought upon suggestion of the Attorney General of the United States at the request of the Interstate Commerce Commission, and upon information furnished by said Commission. [1*]

For a Cause of Action plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

*Page numbering appearing at the foot of page of original certified Transcript of Record.

Plaintiff further alleges that in violation of the Act of Congress known as the Safety Appliance Act, approved March 2, 1893 (27 Statutes at Large, 531), as amended by an Act approved April 1, 1896 (29 Statutes at Large, 85), and as amended by an Act approved March 2, 1903 (32 Statutes at Large, 943), contained in U. S. Code, title 45, secs. 1 to 10 inclusive, defendant, on February 20, 1932, hauled on its line of railroad, over a part of a highway of interstate commerce, one car, to wit: W. P. box No. 16113.

Plaintiff further alleges that on said date defendant hauled said car as aforesaid over its line of railroad in and about San Francisco, in the State of California, within the jurisdiction of this court, when the coupling and uncoupling apparatus on the "A" end of said car was out of repair and inoperative, the uncoupling lever being disconnected from lock lift of coupler on said end of said car, thus necessitating a man or men going between the ends of the cars to couple or uncouple them, and when said car was not equipped with couplers coupling automatically by impact, and which could be uncoupled without the necessity of a man or men going between the ends of the cars, as required by Section 2 of the Safety Appliance Act, as amended by Section 1 of the Act of March 2, 1903. (U. S. Code, title 45, secs. 2 and 8.)

Plaintiff further alleges that by reason of the violation of the said Act of Congress, as amended, defendant is liable to plaintiff in the sum of one hundred dollars. [2]

WHEREFORE, plaintiff prays judgment against said defendant in the sum of One Hundred dollars and its costs herein expended.

GEO. J. HATFIELD
United States Attorney
Attorney for Plaintiff.

[Endorsed]: Filed May 25, 1932. [3]

[Title of Court and Cause.]

SUMMONS

The President of the United States of America To The State of California, Defendant.

YOU ARE HEREBY DIRECTED TO APPEAR AND ANSWER the Complaint in an action entitled as above, brought against you in the District Court of the United States, in and for the Northern District of California, Southern Division, within ten days after the service on you of this Summons, if served within this county, or within thirty days if served elsewhere.

And you are hereby notified that unless you appear and answer as above required the said Plaintiff will take judgment for any money or damages demanded in the Complaint, as arising upon contract or it will apply to the Court for any other relief demanded in the Complaint.

WITNESS the Honorable A. F. ST. SURE, Judge of said District Court, this 25th day of May in the year of our Lord one thousand nine hundred

and thirty-two and of our independence the one hundred and fifty-sixth.

[Seal] WALTER B. MALING, Clerk.
By J. A. Schaertzer, Deputy Clerk. [4]

United States Marshal's Office
Northern District of California

I HEREBY CERTIFY that I received the within writ on the 25th day of May, 1932, and personally served the same on the 25th day of May, 1932, upon State of California by delivering to, and leaving with U. S. Webb, Attorney General for the State of California said defendant named therein personally, at the City and County of San Francisco in said District a certified copy thereof, together with a copy of the Complaint, attached thereto.

San Francisco, May 25th, 1932.

FRED L. ESOLA
U. S. Marshal.
By George W. Kavanaugh
Office Deputy.

[Endorsed]: Received May 25, 1932. U. S. Marshal's Office, San Francisco, Calif.

RETURN ON SERVICE OF SUMMONS

United States of America,
Northern District of California—ss:

I hereby certify and return that I served the annexed Summons on the therein-named State of California, by handing to and leaving a true and correct copy thereof together with Complaint attached thereto with James Rolph, Jr. Governor of

the State of California, personally at Sacramento, California in said District on the Third day of June, A. D. 1932.

FRED L. ESOLA,
U. S. Marshal.
By Wm. M. Ahern
Deputy.

[Endorsed]: Filed Jun 4 1932

[Title of Court and Cause.]

SPECIAL APPEARANCE AND DEMURRER.

COMES NOW the State of California, the defendant herein, and specially appearing under protest for the purpose of this plea, and for no other, says that the court has no jurisdiction over this case for the following reason:

I

That this court has no jurisdiction over the defendant herein in this: That this is a controversy between the United States and a State; that exclusive original jurisdiction of such controversies is in the Supreme Court of the United States.

WHEREFORE defendant prays this cause be dismissed and go hence without day.

U. S. WEBB
Attorney General of the State of California.
RALPH O. MARRON
Deputy Attorney General.
Attorneys for said Defendant.

[Endorsed]: Service of the within Special Appearance and Demurrer by copy admitted this 10 day of Sept. 1932.

GEO. J. HATFIELD
Attorney for .....

Filed Sept 10 1932 [5]

[Title of Court and Cause.]

ORDER

ORDERED that the demurrer of defendant that the court has no jurisdiction for the reason "that exclusive original jurisdiction * * * is in the Supreme Court of the United States" be, and the same is hereby OVERRULED. Defendant may have ten days to answer.

Dated: February 16, 1933.

A. F. ST. SURE
United States District Judge.

[Endorsed]: Filed Feb 16 1933 [6]

[Title of Court and Cause.]

ANSWER

NOW COMES the defendant STATE OF CALIFORNIA and answering the complaint on file herein admits, denies and alleges as follows:

I.

Denies each and every, all and singular the allegations contained in plaintiff's complaint.

As and for a further, separate and distinct answer and defense to the plaintiff's cause of action defendant alleges:

I.

That the State Belt Railroad for about forty-two years last past has been operated under the immediate supervision of various superintendents; that during the year 1932 and at the times involved in plaintiff's complaint on file herein the State Belt Railroad was operated under the immediate supervision of A. R. Pidgeon, Superintendent; that the superintendents of the said State Belt Railroad were appointed by the Board of State Harbor Commissioners and hold office at the pleasure of the said Board of State Harbor Commissioners [7] and are under their general supervision and control as such Board of State Harbor Commissioners; that all inspectors, engineers and yardmen employed in the operation of said State Belt Railroad are Civil Service employees except in cases of emergency employment and that said employees in order to qualify as Civil Service employees must pass an examination for their respective positions; that the said superintendents, inspectors, engineers, yardmen and other employees engaged in the operation of the State Belt Railroad, and all of them, are employees and servants of the State of California.

II.

That the State Belt Railroad is located wholly within the City and County of San Francisco, State of California, and extends the full length of the Embarcadero and Jefferson Street to the Presidio, a distance of approximately five miles; that the State Belt Railroad has a physical connection with the tracks of the Southern Pacific Company near the Embarcadero and Townsend Streets; that its tracks also run on to wharves owned by the State of California and used by freight car ferries of the Southern Pacific Company, the Atchison, Topeka and Santa Fe Railway Company, the Western Pacific Railway Company and the Northwestern Pacific Railway Company, all common carriers engaged in Interstate Commerce by railroad. Adjacent to its main line of road and connecting therewith are certain freight yards of the four interstate carriers above mentioned in which all switching is done by the State Belt Railroad and all cars going into and out of said yards are hauled by the State Belt Railroad; that said yards are owned by the State of California but, by agreement with such interstate carriers, are used by them; that the tracks of the State Belt Railroad also run on to [8] about forty-five wharves owned by the State of California on which said wharves freight is loaded on to, and unloaded from, cars from and on to steamers going to and coming from points within and without the State of California; that none of the tracks of said State Belt Railroad herein mentioned are ever used by any of the carrier roads and no

locomotive other than the locomotives of the State Belt Railroad ever move over any part thereof.

III.

That the said State Belt Railroad is operated by the State of California for the purpose of facilitating the commerce of the Port of San Francisco without any profit being derived therefrom; that the charges made for the services rendered by said State Belt Railroad are made by the Board of State Harbor Commissioners pursuant to the authority conferred upon them by Section 2524 of the Political Code of California which authorizes said Board of State Harbor Commissioners to collect such amount of revenue as will enable them to perform the duties required of them by authority of Article IX of said Political Code; that Section 2526 of the said Political Code expressly limits the amount of money to be collected by such charges to a sum sufficient to meet the operating expenses of said harbor.

IV.

That the operation of the State Belt Railroad is necessary in the interest of and for the benefit of the people of the State of California for the promotion and facilitation of commerce through the Port of San Francisco and that said Railroad is operated solely for such purpose. [9]

V.

That the said State Belt Railroad is operated and managed by a Board of State Harbor Com-

missioners, consisting of P. W. Meherin, J. J. Tynan and Jos. A. Moore; that the said Board of State Harbor Commissioners are officers of the State of California appointed by the Governor, confirmed by the Senate of the State of California, and hold office at the pleasure of the Governor; that all of the property administered by the said Board of State Harbor Commissioners is owned by the State of California; that all revenue received for services rendered by the State Belt Railroad is paid to defendant as such Board of State Harbor Commissioners; that the laws of the State of California provide that all moneys collected by the Board of State Harbor Commissioners shall be paid into the State Treasury at least once each month and be credited to the San Francisco Harbor Improvement Fund.

VI.

That the said State Belt Railroad maintains no repair shops and that the various carriers delivering cars to the State Belt Railroad maintain no repair shops in their yards at which the cars are delivered to the State Belt Railroad for handling; that the State of California, the Board of State Harbor Commissioners and the State Belt Railroad own no cars nor do they haul any cars or freight on their own account.

VII.

That the said Board of State Harbor Commissioners did not as a Board, nor did the members thereof, personally, participate in, or have personal knowledge of, the commission of the allged viola-

tion of the Federal Safety Appliance Act set forth in the complaint herein; that any alleged violation [10] of the Federal Safety Appliance Act occurred without the personal knowledge of the Board of State Harbor Commissioners or any of them, or of the State of California, and without the consent of the Board of State Harbor Commissioners or the State of California and contrary to the orders and instructions of the Board of State Harbor Commissioners of the State of California.

As and for a separate and further answer and defense to the complaint herein, defendant alleges:

I.

That the said District Court has no jurisdiction over defendant in that the defendant, in operating the State Belt Railroad, is performing a governmental function.

WHEREFORE defendant prays that plaintiff take nothing by this action and that defendant be hence dismissed and have judgment against plaintiff for its costs of suit herein expended and for such other and further relief as to the court may seem meet and proper.

U. S. WEBB
Attorney General of the State of California.
RALPH O. MARRON
Deputy Attorney General.
Attorneys for Defendant. [11]

State of California
City and County of San Francisco—ss.

RALPH O. MARRON, being duly sworn, deposes and says:

That he is a citizen of the United States over the age of eighteen years; that he is one of the attorneys for the defendant in the above entitled action; that he has read the foregoing Answer and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated on information and belief and as to those matters he believes them to be true.

RALPH O. MARRON

Subscribed and sworn to before me this 27th day of April 1933.

H. H. LINNEY
Deputy Attorney General.

[Endorsed]: Service of the within Answer by copy admitted this 27 day of Apr. 1933.

I. M. PECKHAM
Attorney for _____.

Filed Apr 27 1933 [12]

[Title of Court and Cause.]

MOTION FOR JUDGMENT.

The above entitled cause having been submitted to the court for decision on the stipulation of facts and on briefs to be filed with the court, the defendant STATE OF CALIFORNIA now moves the

above entitled court for judgment in said cause in favor of the defendant STATE OF CALIFORNIA and against the plaintiff UNITED STATES OF AMERICA.

U. S. WEBB
Attorney General of the
State of California.
RALPH O. MARRON
Deputy Attorney General.
WILLIAM SWEIGERT
Attorneys for Defendant.

[Endorsed]: Filed Jun 6 1933 [13]

[Title of Court and Cause.]

ORDER

This cause was submitted to the Court upon stipulation of facts and plaintiff's motion for judgment and defendant's motion for judgment. After due consideration, it is

ORDERED that plaintiff's motion for judgment be, and the same is hereby GRANTED; that defendant's motion for judgment be, and the same is hereby DENIED; and that judgment be entered herein in favor of plaintiff as prayed for.

Dated: January 16, 1934.

A. F. ST. SURE
United States District Judge.

[Endorsed]: Filed Jan 16 1934 [14]

In the Southern Division of the United States District Court for the Northern District of California.

No. 19246-S

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

THE STATE OF CALIFORNIA,
Defendant.

JUDGMENT

This cause having come on regularly for trial upon the 16th day of January, 1934, before the Court sitting without a Jury, a trial by Jury having been waived by written stipulation filed; L. E. Kilkenny, Assistant United States Attorney, appearing as attorney for plaintiff, and Ralph O. Marron, Esq., appearing as attorney for defendant, and a Stipulation of Facts having been filed, and the cause having been submitted to the Court for consideration and decision, and the Court after due deliberation having rendered its decision and ordered that judgment be entered herein in favor of the plaintiff, as prayed, and for costs;

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the court that The United States of America, Plaintiff, do have and recover of and from The State of California, Defendant, the sum of One Hundred

Dollars ($100.00), together with its costs herein expended, taxed at $19.60.

Judgment entered this 16th day of January, 1934.

WALTER B. MALING,
Clerk. [15]

[Title of Court and Cause.]

EXCEPTIONS OF DEFENDANT, THE STATE OF CALIFORNIA, TO ORDER DENYING DEFENDANT'S MOTION FOR JUDGMENT AND TO JUDGMENT.

Comes now the defendant above named, The State of California, by its attorneys, U. S. Webb, Attorney General of the State of California, and Ralph O. Marron, Deputy Attorney General, and excepts to the ruling and order of the above entitled court made on January 16, 1924, denying said defendant's motion for judgment in its favor and against plaintiff, and ordering that judgment be entered herein in favor of plaintiff as prayed for;

And said defendant further excepts to the judgment of the above entitled court entered herein on January 16, 1934, in favor of plaintiff and against defendant in the sum of One Hundred Dollars ($100.00) and costs, and to the whole of said judgment.

Said exceptions are made and taken on the grounds that said judgment is contrary to the law and the facts stipulated [16] by the parties to said action at the trial, and is not sustained by the facts so stipulated.

Said defendant requests that said exceptions and

each of them be duly noted and entered in the minutes of the above entitled court.

U. S. WEBB
Attorney General of the
State of California.
RALPH O. MARRON
Deputy Attorney General.
Attorneys for Defendant,
The State of California.

The above exceptions of defendant, the State of California, are hereby allowed.

A. F. ST. SURE
United States District Judge.

Dated, Feb. 2, 1934.

[Endorsed]: Service and receipt of a copy of the within Exceptions of Defendant, etc. is hereby admitted and acknowledged this 2nd day of February, 1934.

H. H. McPIKE
Attorney for Plaintiff.

Filed Feb 2 1934 [17]

[Title of Court and Cause.]

STIPULATION AND ORDER EXTENDING TIME WITHIN WHICH TO FILE BILL OF EXCEPTIONS ON APPEAL TO AND INCLUDING FEBRUARY 23, 1934.

It is hereby stipulated and agreed by and between the parties to the above entitled action that The State of California, defendant above named,

may have to and including the 23rd day of February, 1934, within which to prepare, serve and file its Bill of Exceptions on appeal in the above entitled cause, and that the time therefor is hereby extended to and including said date.

H. H. McPIKE
United States Attorney.
NORRIS R. CLARK
Assistant United States Attorney
Attorneys for Plaintiff.
U. S. WEBB
Attorney General of the State of California
RALPH O. MARRON
Deputy Attorney General
Attorneys for Defendant.

It is so ordered:

A. F. ST. SURE
United States District Judge.

Dated: January 24, 1934.

[Endorsed]: Filed Jan 24 1934 [18]

[Title of Court and Cause.]

STIPULATION AND ORDER EXTENDING TIME WITHIN WHICH TO PREPARE, SERVE, FILE, SIGN AND SETTLE DEFENDANT'S BILL OF EXCEPTIONS ON APPEAL TO AND INCLUDING MARCH 24, 1934.

It is hereby stipulated and agreed by and between the parties to the above entitled action that The

State of California, defendant above named, may have to and including the 24th day of March, 1934, within which to prepare, serve, file, and to have signed and settled its Bill of Exceptions on appeal in the above entitled cause, and that the time therefor is hereby extended to and including said date;

And it is further stipulated and agreed by and between said parties that the November term of the above entitled Court is hereby extended to and into the March, 1934 term of said Court and to and including the 24th day of March, 1934, for the [19] purpose of preparing, serving, filing, signing and settling of said Bill of Exceptions.

H. H. McPIKE
United States Attorney
MORRIS R. CLARK
Assistant United States Attorney
Attorneys for Plaintiff.
U. S. WEBB
Attorney General of the State of California
RALPH O. MARRON
Deputy Attorney General.
Attorneys for Defendant.

It is so ordered:

A. F. ST. SURE
United States District Judge.

Dated: February 21, 1934.

[Endorsed]: Filed Feb 21 1934 [20]

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

BE IT REMEMBERED that on the 25th day of May, 1932, the above entitled action was commenced by the filing of a complaint and the issuance of a summons; that thereafter and on or about the 10th day of September, 1932, defendant appeared specially therein and filed a special appearance and demurrer; that thereafter said demurrer was set for hearing and on or about September 26, 1932, came on for hearing and was regularly heard and argued in the above entitled court;

AND BE IT FURTHER REMEMBERED that on the 16th day of February, 1933, the above entitled court, Honorable A. F. St. Sure, United States District Judge, presiding, duly and regularly made and filed an order overruling the demurrer of defendant to said complaint and allowing defendant ten days to answer; that thereafter and within the time allowed by law the above named defendant filed its answer to the complaint on file in said action;

AND BE IT FURTHER REMEMBERED that on June 6, 1933, [21] the parties to the above entitled action made and filed in said court the following written waiver of jury trial and stipulation of facts:

[Title of Court and Cause.]

WAIVER OF JURY
and
STIPULATION OF FACTS

Come now the plaintiff and defendant in the above numbered and styled cause, by their respec-

tive attorneys, and hereby stipulate and agree that this cause may be heard and determined by the Court upon the following facts, a jury being hereby expressly waived:

I.

The State Belt Railroad (hereinafter called The Belt) is located wholly within the City and County of San Francisco, California, and extends practically the full length of the Embarcadero and Jefferson Street to the Presidio, a distance of approximately five miles. It has a physical connection with the tracks of the Southern Pacific Company near the Embarcadero and Townsend Street; its tracks also run on to wharves owned by the State of California and used by freight car ferries of the Southern Pacific Company, the Atchison, Topeka & Santa Fe Railway Company, the Western Pacific Railway Company and the Northwestern Pacific Railway Company, all common carriers engaged in interstate commerce by railroad. Adjacent to the line of The Belt and connecting therewith are certain freight yards of the four interstate carriers mentioned, in which all switching is done by The Belt, and all cars going into and out of these yards are hauled by The Belt. [22] These yards are owned by the State of California, and by agreement are used by the interstate carriers mentioned. The tracks of The Belt also run on to about 45 wharves owned by the State of California, on which freight is loaded onto cars from steamers and unloaded therefrom onto cars.

At various points along its line and with which The Belt has trackage connections, are located ap-

proximately 175 industries. All of these industries, the 45 wharves, car ferries and freight yards mentioned, are served exclusively by The Belt, in so far as the movement of loaded and empty cars are concerned. The Belt also moves carload freight and empty cars for loading from and onto the Southern Pacific transfer tracks, such movements being for the limited purpose of interchanging cars. These transfer tracks are for the use of shippers or consignees who do not have industrial or private tracks of their own. Such cars are loaded by the shippers or unloaded by the consignees; no freight is ever loaded or unloaded by The Belt. These transfer tracks are owned and operated by the Southern Pacific, but by agreement The Belt has trackage rights over them for the limited purpose of interchanging cars, as above stated. The Belt moves all carload freight, as well as empty cars, between these industries, wharves, car ferries, yards and transfer tracks mentioned, whether consigned to or from points within or without the State of California, as well as those having points of origin and destination without that State. Of all the cars and movements mentioned herein, no discrimination is made as between cars owned by railroads operating within or exclusively without the State of California. The Belt moves all cars offered it by those industries, steamship companies, the four carrier roads [23] and those shippers using the transfer tracks mentioned. The Belt also moves between the Presidio and the steamship docks, car ferries, yards, and transfer tracks mentioned, cars originating

within and without the State of California and consigned to the Presidio or vice versa.

None of the tracks of The Belt are ever used by any of the other carrier roads except for the limited purpose of interchanging cars, and no locomotives, except those of The Belt, ever move over any part thereof. Neither the State of California nor The Belt owns any cars. Neither is it a party to any *thorough* rate for the transportation of cars or any shipment between point of origin and final destination, nor does The Belt move same on any through waybill. It simply charges a flat rate for moving a car between two points, the rate for a loaded car being a little higher than for an empty car. Such charges are uniform without any consideration as to point of origin or destination. The Belt also charges a flat rate, regardless of point of origin or destination, for the movement of baggage and Pullman cars, principally to and from the Presidio and points mentioned.

For inbound freight shipments, cars are moved to points on The Belt on so-called "switch lists" made out by the delivering carrier; these show the number and initials of each car, whether loaded or empty, and point of delivery or final destination on The Belt. The original waybill is retained by the carrier delivering the car to The Belt; this shows the point of origin, car number and initials, contents, consignee and ultimate destination on the line of The Belt and the through rate to such ultimate destination, including The Belt's switching charge which is absorbed and paid to The Belt

by the [24] carrier from whom the car is received. On outbound shipments, this "switch list" is made out by an agent of the carrier to whom the car is to be delivered by The Belt, and shows the number and initials of the car, whether loaded or empty, and the place where same is to be spotted. Concurrently with the making of such "switch list," this agent (first having received a shipping order from the consignor) makes out and delivers to said carrier a waybill for the movement of the car to its final destination, showing, in addition to other things heretofore mentioned, the consignor and point of origin and ultimate destination of the car. The car is then moved by a Belt crew on the "switch list", delivered to the carrier making out the through waybill and that carrier then continues the transportation of such car to its final destination on such waybill. The switching charge on outbound shipments is also absorbed and collected in the same manner as the switching charge on inbound shipments.

In some instances, where The Belt shifts or switches a car between two points on its line without delivery to any other carrier, it collects such switching charge from the industry or individual requesting such movement.

A large majority of the daily movements of The Belt for the year ending December 30, 1932, were carload shipments of freight, (a) originating in States other than California and destined to consignees on The Belt, or (b) originating on The Belt and destined to consignees in States other than

California. Many of the cars so hauled by The Belt during that year, both originated, and were consigned to points, in States other than California; and a considerable portion of the traffic so handled by the Belt, originated in, or was destined to foreign countries. [25]

The Board of State Harbor Commissioners (hereinafter called the Board) has no knowledge either as to the point of origin or final destination of any car handled by The Belt on the so-called switch list.

II.

The Belt is managed by the Board which for a number of years has consisted of P. W. Meherin, J. J. Tynan and Jos. A. Moore; they are officers of the State of California, appointed by the Governor, confirmed by the Senate of the State, and hold office at the pleasure of the Governor. All the properties administered by the Board, including The Belt, are owned by the State of California. All revenues received for services rendered by The Belt are paid to such Board; and pursuant to the laws of the State of California all monies collected by that Board shall be paid into the State Treasury at least once each month and be credited to the San Francisco Harbor Improvement Fund.

The Belt is not an incorporated company or a distinct agency of the State; its name was simply adopted by the Board to designate it as one of the many diversified instrumentalities of the Board and used in connection with the Board's powers.

III.

The Belt is operated by the State of California for the purpose of facilitating the commerce of the Port of San Francisco without any profit being derived therefrom; the charges made for the services rendered by it are fixed by the Board pursuant to the authority conferred upon it by Section 2524 of the Political Code of California, which authorizes said Board to collect such amount of revenue as will enable it to [26] perform the duties required of it by authority of Article IX of said Code; and Section 2526 of said Code expressly limits the amount of money to be collected by such charges to a sum sufficient to meet the operating expenses of said harbor.

IV.

The operation of The Belt is considered necessary by the State of California in the interest of and for the benefit of its people in the promotion and facilitation of commerce through the Port of San Francisco, and is operated solely for that purpose.

V.

For about forty-two years The Belt has been operated, and still is operated, under the immediate supervision of various superintendents; and during the year 1932 was operated under the immediate supervision of A. R. Pidgeon, Superintendent. The various superintendents of The Belt are appointed by the Board, are under its general supervision and control, and hold office at the pleasure of such Board. All inspectors, engineers and yardmen em-

ployed in the operation of The Belt are civil service employees, except in cases of emergency employment; said employees, in order to qualify as Civil Service employees, must pass an examination for their respective positions. All superintendents, inspectors, engineers and yardmen and other employees engaged in the operation of the State Belt Railroad are employes and servants of the State of California.

VI.

On February 20, 1932, The Belt hauled over its line in San Francisco Western Pacific box car No. 16113; this movement, consisting of a number of cars, was from The Belt's Beal Street Yard to the tracks on the north side of Pier 30, where [27] the Western Pacific and other cars were spotted alongside the steamship "Sierra" for unloading; the Western Pacific Car No. 16113 was loaded with sacked rice at East Briggs, California, and was consigned to Paia, Hawaiian Islands. During this movement, the coupling and uncoupling apparatus on the "A" end of said Western Pacific car was out of repair and inoperative as alleged in the complaint filed herein, thus necessitating a man or men going between the "A" end of said car and adjoining car to couple or uncouple them.

The Belt maintains no repair shops and the carriers delivering cars to The Belt maintain no repair shops in their yards at which cars are delivered to or received from, The Belt. The defects in this car could have been repaired in a few minutes and it was not necessary that same should be sent to

any so-called repair shop for that purpose. No employee of The Belt discovered the defects mentioned, and The Belt has no record of when the car was repaired, or whether it was later repaired, either before or after being delivered to one of the other carriers mentioned.

The Board did not as a Board, nor did any member thereof, personally, participate in, or have personal knowledge of, the movement of such car in its defective condition; and if any violation of the Federal Safety Appliance Act occurred, it was without the personal knowledge of the Board, or any member thereof, or of the State of California, and was without the consent of, but contrary to general instructions issued by the Board.

VII.

All of the facts herein stipulated (except as otherwise expressly stated) were true at all times during the year [28] 1932, and at all times mentioned in the complaint herein.

VIII.

Neither the sum prayed for in the complaint herein nor any part thereof has been paid to plaintiff or to any one for its use.

IX.

The practice of The Belt in carrying on its business has been as above described for many years.

X.

Attached hereto and marked Exhibit "A" and made a part of this Stipulation is a map showing the tracks of The Belt and its various connections referred to herein.

XI.

IT IS FURTHER STIPULATED AND AGREED that the constitutional provisions and statutes of the State of California may be judicially noticed by the Court and considered as part of this stipulation.

H. H. McPIKE
United States Attorney
LUCAS E. KILKENNY
Ass't United States Attorney
M. C. LIST
Special Ass't United States Attorney
Attorneys for Plaintiff.
U. S. WEBB
Attorney General of the State of California
RALPH O. MARRON
Deputy Attorney General
WILLIAM T. SWEIGERT
Attorneys for Defendant.

AND BE IT FURTHER REMEMBERED that the above entitled [29] cause came on regularly for trial before the above entitled court sitting with-

out a jury, a jury having been waived in writing by both parties, on June 6, 1933, Honorable A. F. St. Sure, United States District Judge, presiding, H. H. McPike, United States Attorney, Lucas E. Kilkenny, Assistant United States Attorney, and M. C. List, Special Assistant United States Attorney, appearing as attorneys for plaintiff, and U. S. Webb, Attorney General of the State of California, Ralph O. Marron, Deputy Attorney General, and William T. Sweigert appearing as attorneys for defendant, whereupon the following proceedings were had:

Said cause was argued before said court upon the stipulation of facts theretofore filed in said court, and at the conclusion of the argument a motion was made on behalf of plaintiff for judgment in its favor, and a motion was made and filed in said court by the defendant, State of California, for judgment of the court in favor of said defendant and against the plaintiff, United States of America; that said motion of said defendant was in words as follows, to wit:

[Title of Court and Cause.]

MOTION FOR JUDGMENT.

The above entitled cause having been submitted to the court for decision on the stipulation of facts and on briefs to be filed with the court, the defendant STATE OF CALIFORNIA now moves the above entitled court for judgment in said cause in favor of the defendant STATE OF CALIFORNIA

and against the plaintiff UNITED STATES OF AMERICA.

U. S. Webb
Attorney General of the
State of California.
RALPH O. MARRON
Deputy Attorney General.
WILLIAM SWEIGERT
Attorneys for Defendant. [30]

That said cause was submitted to the court for decision on said stipulation of facts, and on said motions, and on briefs to be filed; that thereafter and after the filing of briefs by the parties, and on October 4, 1933, said cause was regularly submitted to said court for its decision;

AND BE IT FURTHER REMEMBERED that thereafter the said court on to wit the 16th day of January, 1934, ordered that judgment be entered for plaintiff, to which ruling and order of the court, the defendant, The State of California, duly excepted, and hereby designates as

DEFENDANT'S EXCEPTION No. 1.

AND BE IT FURTHER REMEMBERED that thereafter and pursuant to said last mentioned order of said court, to wit, on the 16th day of January, 1934, judgment was entered in favor of plaintiff and against defendant, The State of California, to which judgment said defendant duly excepted on the grounds that said judgment is contrary to the law and to the facts stipulated by the parties to said

action at the trial, and is not sustained by the facts so stipulated, and hereby designates as

DEFENDANT'S EXCEPTION No. 2.

Now within the time allowed by law and the stipulation of the parties to said action and the order of the above entitled court, defendant, The State of California, presents the foregoing as its proposed Bill of Exceptions in the above entitled action and prays that the same may be settled and allowed.

Dated: February 24, 1934.

U. S. Webb
Attorney General of the State of California.
RALPH O. MARRON
Deputy Attorney General of the State of California.
WILLIAM T. SWEIGERT
Attorneys for defendant, State of California. [31]

STIPULATION FOR ALLOWANCE OF BILL OF EXCEPTIONS.

IT IS HEREBY STIPULATED AND AGREED that the foregoing bill of exceptions was presented by defendant, The State of California, within the time allowed by law therefor and that the same is a true and correct copy of the proceedings had at the trial of the above entitled action,

and that the same may be certified, allowed and settled, as provided by law and the practice of said court, by Honorable A. F. St. Sure, United States District Judge, who presided at the trial of said cause.

Dated: March 10th, 1934.

H. H. McPIKE
United States Attorney
MORRIS B. CLARK
Ass't United States Attorney
M. C. LIST
Special Ass't United States Attorney
Attorneys for Plaintiff.
U. S. WEBB
Attorney General of the State of California
RALPH O. MARRON
Deputy Attorney General of the State of California
WILLIAM T. SWEIGERT
Attorneys for Defendant

ORDER SETTLING AND ALLOWING BILL OF EXCEPTIONS.

I, the undersigned, Judge of the District Court of the United States, do hereby certify that the foregoing bill of exceptions, having been presented within the time allowed by law therefor, is a true and correct copy of the proceedings had at the trial of said action, and do hereby settle and allow the same and order that said bill of exceptions be filed with the Clerk of this court.

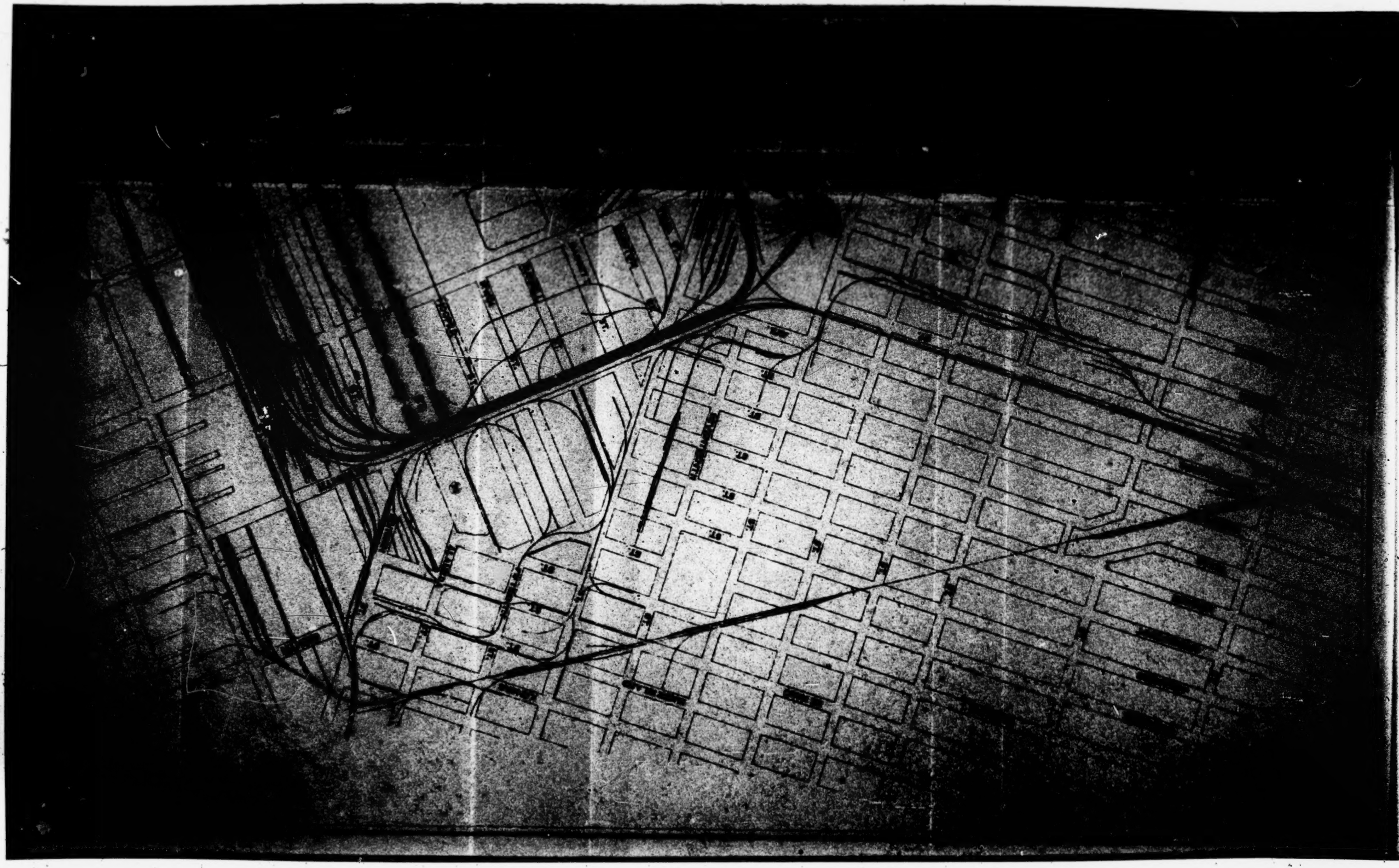
Dated: March 14, 1934.

A. F. ST. SURE
United States District Judge.

[Endorsed]: Service of the within Proposed Bill of Exceptions of Defendant, State of California admitted this 26th day of February, 1934.

H. H. McPIKE
United States Attorney.
MORRIS C. CLARK
Assistant United States Attorney.
M. C. LIST
Spec. Asst. U. S. Atty.

Filed Mar. 16, 1934. [32]



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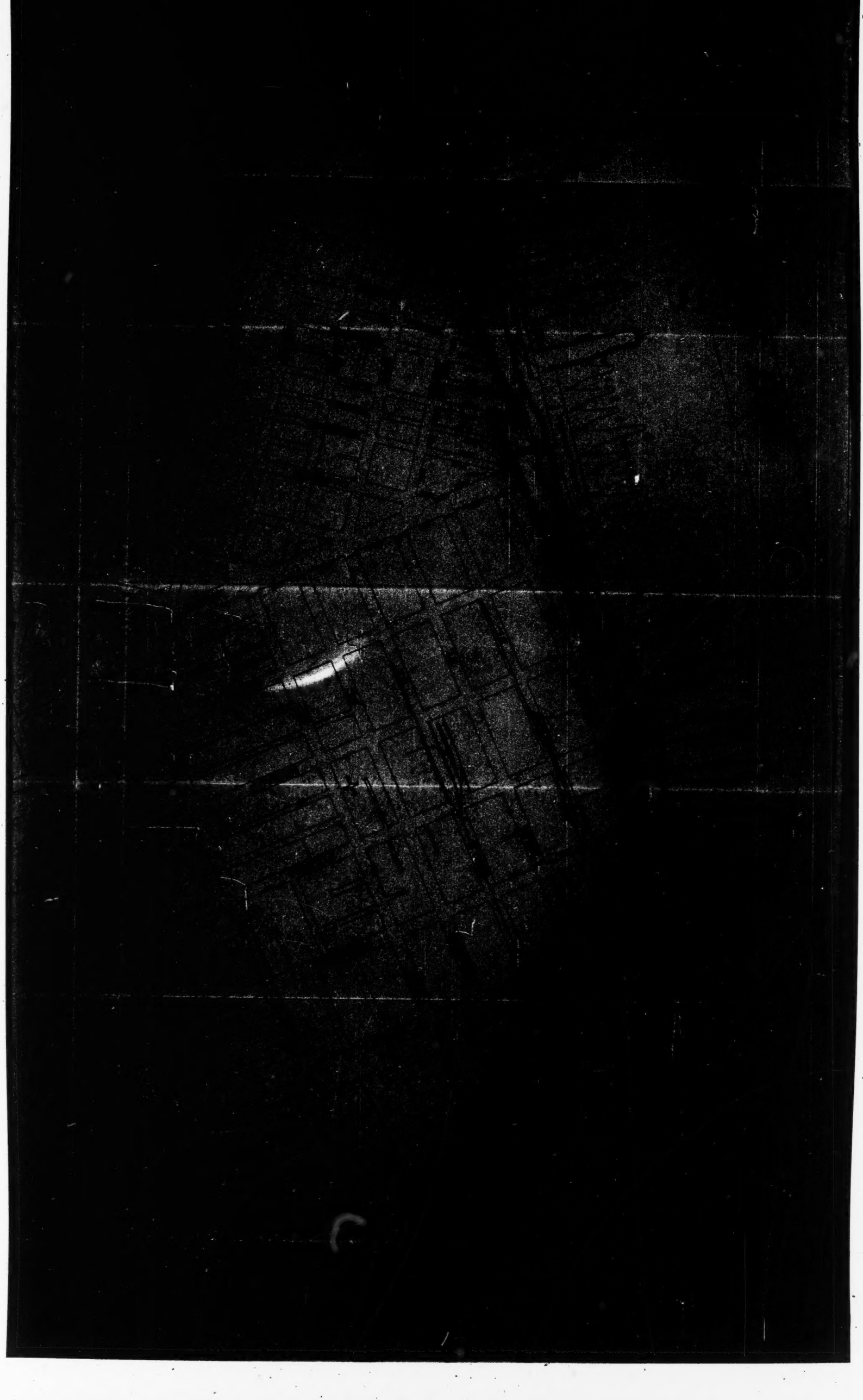

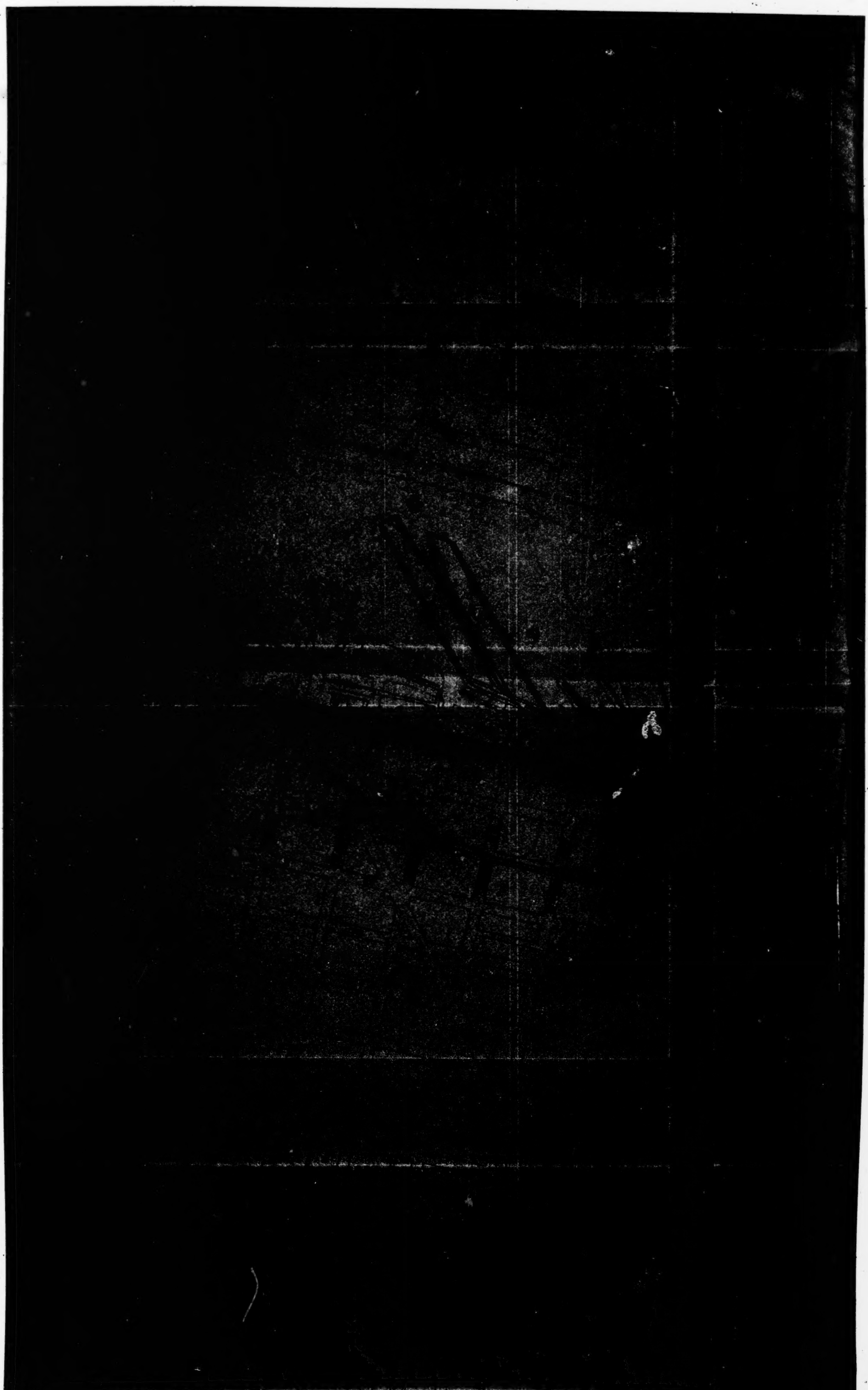

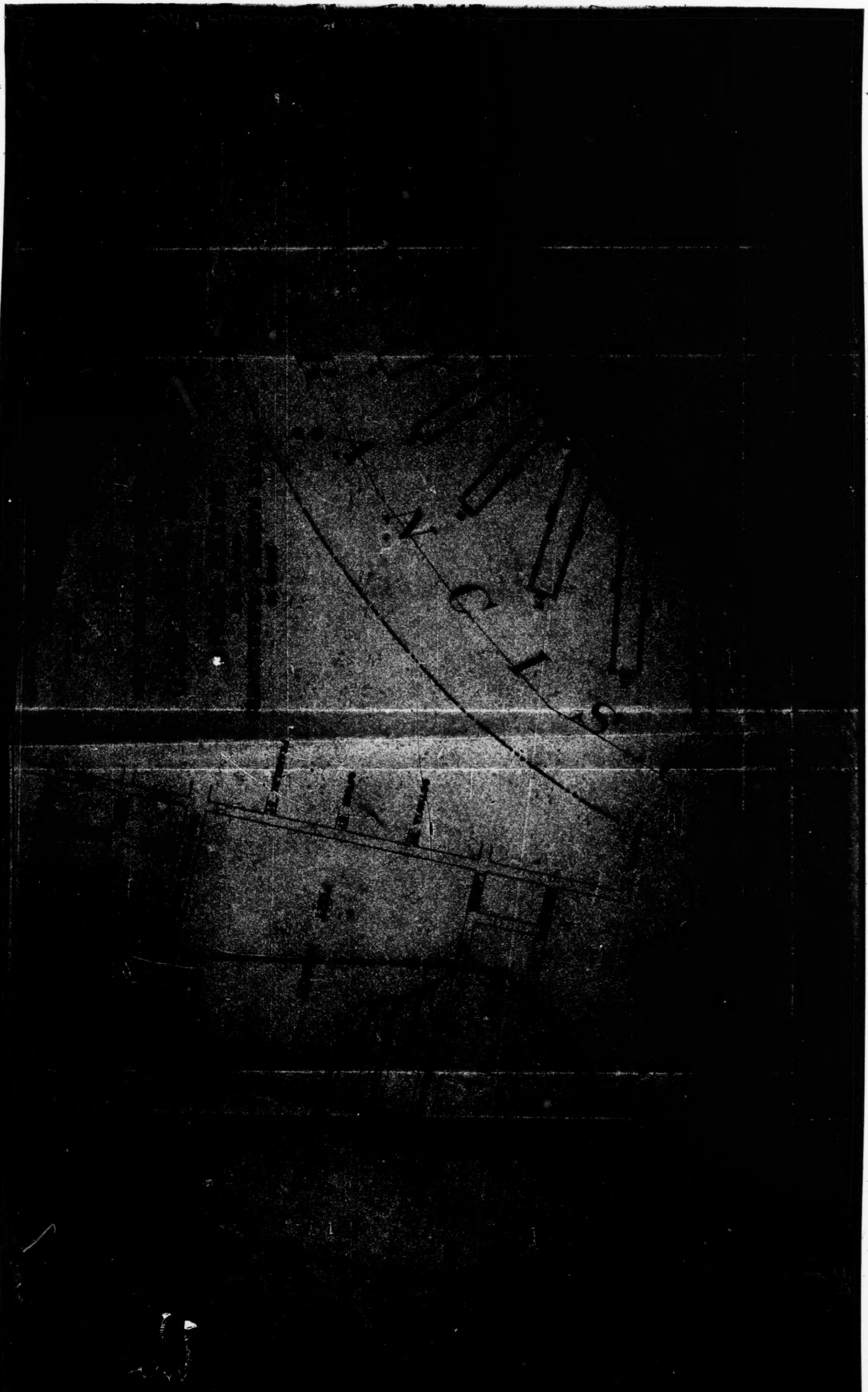

[Title of Court and Cause.]

PETITION FOR APPEAL.

The State of California, defendant in the above entitled action, feeling itself aggrieved by the rulings of the Court and the final judgment given, made and entered in said action on January 16, 1934, by which said judgment it was ordered, adjudged and decreed that plaintiff, The United States of America, do have and recover of and from defendant, The State of California, the sum of One Hundred ($100.00) Dollars together with costs of suit, for the reasons specified in the Assignment of Errors herewith presented and filed by said defendant, hereby appeals from said judgment to the United States Circuit Court of Appeals for the Ninth Circuit, and said defendant prays for an order of this Court allowing said defendant's appeal to the United States Circuit Court of Appeals for the Ninth Circuit, that citation be issued as provided by law, that a transcript of the record, papers and proceedings in said action, upon which said judgment was made, duly authenticated, [33] may be sent to said United States Circuit Court of Appeals for the Ninth Circuit, and that an order be made by this Court fixing the amount of the security which the said defendant shall furnish upon said appeal, and that all further proceedings be suspended, stayed and superseded until the determination of said appeal by said United States Cir-

cuit Court of Appeals for the Ninth Circuit.

And your petitioner will ever pray, etc.

Dated: March 10, 1934.

U. S. WEBB
Attorney General of the State of California.
RALPH O. MARRON
Deputy Attorney General.
WILLIAM T. SWEIGERT
Attorneys for Defendant, The State of California.

[Endorsed]: Filed Mar 10 1934 [34]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Comes now the State of California, defendant herein, and in connection with and as part of its appeal herein, makes and files the following Assignment of Errors upon which it will rely in prosecuting its appeal herein, and which it avers intervened and were committed during the trial of the above entitled cause, and in overruling defendant's demurrer herein, and in giving and entering judgment against this defendant and in favor of plaintiff, to defendant's prejudice, to wit:

I.

That the said United States District Court erred in overruling defendant's demurrer to plaintiff's complaint herein for the following reasons:

(a) That plaintiff's complaint herein does not state facts sufficient to constitute a cause of action against said defendant, the State of California.

(b) That the United States District Court had no jurisdiction over said defendant in that said defendant at all [35] times mentioned in the complaint was operating the State Belt Railroad in the performance of a governmental function of the State of California.

(c) That the United States District Court has no jurisdiction of an action against the State of California; such jurisdiction being original in the Supreme Court of the United States.

II.

That said Court erred in refusing to enter judgment herein for defendant and against plaintiff, as requested by defendant at the close of the trial, in the following particulars:

(a) Said District Court has no jurisdiction over an action against the State of California, such jurisdiction being original in the Supreme Court of the United States under the Constitution and laws of the United States.

(b) The United States of America has no authority to impose a fine or penalty upon the State of California.

III.

That the said Court erred in rendering and entering judgment in favor of plaintiff and against defendant in the following particulars:

(a) Said District Court has no jurisdiction over an action against the State of California, such jurisdiction being original in the Supreme Court of the United States under the Constitution and laws of the United States.

(b) The United States of America has no authority to impose a fine or penalty upon the State of California.

IV.

That said Court erred in adjudging that it had juris- [36] diction over an action against the State of California, acting as the operator of the State Belt Railroad, such jurisdiction being original in the Supreme Court of the United States.

V.

That said Court erred in giving judgment in favor of plaintiff and against defendant herein in that in so doing, it imposed a fine or penalty upon the State of California for acts occurring in the regular performance of a governmental function of the State of California.

VI.

That said Court erred in rendering and entering judgment in favor of plaintiff and against defendant herein in that the evidence was and is insufficient to justify the said judgment of said Court.

VII.

That said Court erred in rendering and entering judgment for plaintiff and against defendant in

said action in that said judgment is contrary to the law and the facts.

WHEREFORE, said defendant prays that said judgment of the United States District Court for the Northern District of California, Southern Division, dated January 16, 1934, be reversed, and that said District Court be ordered to enter judgment in favor of defendant, the State of California, and for such other and further relief as may be proper in the premises.

Dated: March 10, 1934.

U. S. WEBB
Attorney General of the State of California.
RALPH O. MARRON
Deputy Attorney General.
WILLIAM T. SWEIGERT
Attorneys for Defendant, The State of California.

[Endorsed]: Filed Mar 10 1934 [37]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL AND FIXING AMOUNT OF BOND ON APPEAL.

The defendant, The State of California, in the above entitled cause having prayed for the allowance of an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the proceedings and judgment made and entered herein by the

United States District Court for the Northern District of California, Southern Division, on the 16th day of January, 1934, and from each and every part thereof, and having presented and filed its Petition for Appeal, Assignment of Errors, and Prayer for Reversal pursuant to the statutes and rules in such case made and provided:

Upon motion of U. S. Webb, Attorney General of the State of California, Ralph O. Marron, Deputy Attorney General, and William T. Sweigert, attorneys for said defendant,

IT IS ORDERED that the appeal of said defendant to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment made and entered in the above entitled [38] action on January 16, 1934, be and the same is hereby allowed, and that the Clerk of this Court prepare and certify a Transcript of Record, papers, proceedings and judgment in this cause and transmit the same to the United States Circuit Court of Appeals for the Ninth Circuit, and

IT IS FURTHER ORDERED that the bond on said appeal be and hereby is fixed in the sum of $400, conditioned as required by law to cover damages, judgment and costs, and that said bond on appeal shall operate as and constitute a supersedeas bond.

Dated: March 10, 1934.

A. F. ST. SURE
United States District Judge.

[Endorsed]: Filed Mar 10 1934 [39]

[Title of Court and Cause.]

UNDERTAKING ON APPEAL.

Know all men by these presents:

That AMERICAN BONDING COMPANY OF BALTIMORE, a corporation duly organized and existing under and by virtue of the State of Maryland, and duly licensed to transact business in the State of California, is firmly bound unto The United States of America, plaintiff in the above entitled cause, in the sum of Four Hundred and No/100 Dollars, to be paid unto the said The United States of America, for which payment well and truly to be made, AMERICAN BONDING COMPANY OF BALTIMORE binds itself, its successors and assigns firmly by these presents.

Signed, sealed and dated this 12 day of March, 1934.

The condition of the above obligation is such that whereas the said The State of California, defendant in the above entitled cause, has appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment of the above [40] entitled Court entered in said cause on the 16th day of January, 1934.

Now, therefore, the condition of the above obligation is such that if the said The State of California shall prosecute its said appeal to effect and answer all damages and costs if it fail to make its plea good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

It is further stipulated as a part of the foregoing bond that in case of the breach of any condition thereof, the above named District Court may, upon notice to said surety of not less than ten days, proceed summarily in the above entitled action to ascertain the amount which said surety is bound to pay on account of such breach, and render judgment therefor against said surety and award execution therefor.

AMERICAN BONDING COMPANY
OF BALTIMORE
By WALTER JARDINE
Attorney in Fact.

This bond approved as to form, amount and sufficiency of surety.

Dated: March 13, 1934.

A. F. ST. SURE
United States District Judge. [41]

State of California,
City and County of San Francisco—ss.

On this 12 day of March in the year one thousand nine hundred and thirty-four, before me, H. I. Stratton a Notary Public in and for the City and County of San Francisco, personally appeared Walter Jardine known to me to be the person whose name he subscribed to the within instrument as the Attorney-in-Fact of the American Bonding Company of Baltimore, and acknowledged to me that he subscribed the name of the American Bond-

ing Company of Baltimore thereto as principal, and his own name at Attorney-in-Fact.

[Seal] H. I. STRATTON

Notary Public in and for the City and County of San Francisco, State of Calif.

[Endorsed] Filed Mar 14 1934 [42]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD ON APPEAL.

To the Clerk of the above-entitled Court:

Please prepare and certify papers filed and proceedings had in the above entitled proceedings as are necessary to a determination of defendant's appeal herein, and include therein the following papers and documents:

1. Complaint and Summons with return,
2. Special Appearance and Demurrer of defendant, The State of California,
3. Order Overruling Demurrer,
4. Answer to Complaint,
5. Waiver of Jury and Stipulation of Facts,
6. Defendant's Motion for Judgment,
7. Order for Judgment, and denying defendant's Motion for Judgment,
8. Judgment,
9. Stipulation and Order Extending Time to File Bill of Exceptions to February 23, 1934, [43]
10. Stipulation and Order Extending Time to Prepare Bill of Exceptions and Term until March 24,1934,
11. Exceptions of Defendant to Order denying

defendant's Motion for Judgment and to Judgment and Order allowing same,

12. Bill of Exceptions,

13. Petition for Appeal,

14. Assignment of Errors,

15. Order Allowing Appeal and Fixing Amount of Bond on Appeal,

16. Citation on Appeal with admission of service,

17. Undertaking on Appeal,

18. Clerk's Certificate,

19. This Praecipe.

Dated: March 10, 1934.

U. S. WEBB
Attorney General of the State of California.
RALPH O. MARRON
Deputy Attorney General.
WILLIAM T. SWEIGERT
Attorneys for Defendant, The State of California.

[Endorsed]: Service and receipt of a copy of the within Praecipe is hereby admitted this 10th day of March, 1934.

H. H. McPike
United States Att'y for No. Dist. of Calif.
MORRIS R. CLARK
Assistant United States Attorney
M. C. LIST
Special Ass't. to the United States att'y.

[Title of Court and Cause.]

STIPULATION RE AMENDMENT OF PRAECIPE FOR TRANSCRIPT OF RECORD ON APPEAL AND RE CERTIFYING OF WAIVER OF JURY AND STIPULATION OF FACTS

WHEREAS the Praecipe for Transcript of Record on Appeal filed in the above entitled Court by defendant, The State of California, requested the Clerk of said Court to include among the papers to be certified by him as Item 5 of said Praecipe, a document entitled "Waiver of Jury and Stipulation of Facts", and as Item 12 of said Praecipe, a document entitled "Bill of Exceptions", and

WHEREAS the said Bill of Exceptions contains in full the document entitled "Waiver of Jury and Stipulation of Facts", and the printing of both of said documents would entail needless repetition and expense;

NOW, THEREFORE, it is hereby stipulated by plaintiff and defendant that said Praecipe be and is hereby amended by striking out said Item 5 thereof; and

It is further stipulated that said document specified in said Item 5 of said Praecipe need not be certified by the Clerk of this Court, and that the "Waiver of Jury and Stipulation of Facts" contained in the Bill of Exceptions (Item 12 of said Praecipe) shall constitute such Waiver of Jury and Stipulation of Facts for all purposes of defendant's appeal in said action; and

It is further stipulated that this stipulation be included in said Transcript of Record on Appeal, and be properly certified by the Clerk of the above entitled Court.

Dated: March 20, 1934. [45]

H. H. McPIKE
United States Attorney
MORRIS R. CLARK
Assistant United States Attorney
M. C. LIST
Special Assistant United States Attorney
Attorneys for Plaintiff and Appellee.

U. S. WEBB
Attorney General of the State of California
RALPH O. MARRON
Deputy Attorney General
WILLIAM T. SWEIGERT
Attorneys for Defendant and Appellant.

[Endorsed]: Due service of the within Stipulation Re: Amendment of Praecipe admitted this 20th day of March, 1934.

H. H. McPIKE
MORRIS R. CLARK
M. C. LIST
Attorneys for Plaintiff and Appellee.

Filed Mar 20 1934 [46]

[Title of Court.]

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL

I, WALTER B. MALING, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 46 pages, numbered from 1 to 46, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case entitled THE UNITED STATES OF AMERICA vs. THE STATE OF CALIFORNIA No. 19246-S, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of $8.70 and that the said amount has been paid to me by the Attorney for the appellant herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 21st day of March A. D. 1934.

[Seal] WALTER B. MALING
Clerk.
J. P. Welsh,
Deputy Clerk. [47]

[Title of Court and Cause.]

CITATION ON APPEAL.

The United States of America—ss.

The President of the United States to The United States of America, and to H. H. McPike, United States Attorney for the Northern District of California, Morris R. Clark, Assistant United States Attorney, and M. C. List, Special Assistant to the United States Attorney, Attorneys for Plaintiff, Greeting:

YOU ARE HEREBY CITED and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal of record in the Clerk's office of the United States District Court for the Northern District of California, Southern Division, wherein The State of California is appellant and the United States of America is appellee, to show cause, if any there be, why the judgment rendered and entered against said appellant as in the said order [48] allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable A. F. ST. SURE, United States District Judge for the Northern District of California, Southern Division, this 10th day of March, 1934.

A. F. ST. SURE
United States District Judge. [49]

Service and receipt of a copy of the within Citation on Appeal and copies of Petition for Appeal, Assignment of Errors, and Order Allowing Appeal and Fixing Amount of Bond on Appeal is hereby admitted, this 10th day of March, 1934.

H. H. McPIKE
United States Att'y for
No. Dist of Calif.
MORRIS R. CLARK
Assistant United States
Attorney
M. C. LIST
Special Ass't to the
United States Att'y.
Attorneys for Plaintiff
and Appellee.

[Endorsed]: Filed Mar 10 1934.

[Endorsed]: No. 7436. United States Circuit Court of Appeals for the Ninth Circuit. The State of California, Appellant, vs. The United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed March 23, 1934.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 7436

THE STATE OF CALIFORNIA, APPELLANT

vs.

THE UNITED STATES OF AMERICA, APPELLEE

Upon appeal from the District Court of the United States for the Northern District of California, Southern Division

Proceedings had in the United States Circuit Court of Appeals for the Ninth Circuit

At a stated term, to wit, the October term, A. D. 1934, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the court room thereof, in the city and county of San Francisco, in the State of California, on Tuesday the thirtieth day of October, in the year of our Lord one thousand nine hundred and thirty-four.

Present: The Honorable Curtis D. Wilbur, senior circuit judge, presiding; Honorable William H. Sawtelle, circuit judge; Honorable Francis A. Garrecht, circuit judge.

Order of submission

Ordered appeal in above cause argued by Mr. Ralph O. Marron, Deputy Attorney General, State of California, counsel for appellant, and by Mr. James O. Tolbert, special assistant United States attorney, counsel for appellee, and submitted to the court for consideration and decision.

At a stated term, to wit, the October term, A. D. 1934, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the court room thereof, in the city and county of San Francisco, in the State of California, on Monday, the twenty-eighth day of January in the year of our Lord one thousand nine hundred and thirty-five.

Present: The Honorable Curtis D. Wilbur, senior circuit judge, presiding; Honorable Francis A. Garrecht, circuit judge, Honorable Charles C. Cavanah, district judge.

Order directing filing of opinion and filing and recording of judgment

By direction of the court, ordered that the typewritten opinion this day rendered by this court in above cause be forthwith filed by the clerk and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion filed.

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 7436

THE STATE OF CALIFORNIA, APPELLANT

vs.

THE UNITED STATES OF AMERICA, APPELLEE

Jan. 28, 1935

Upon appeal from the District Court of the United States for the Northern District of California, Southern Division

Before WILBUR and GARRECHT, Circuit Judges

WILBUR, *Circuit Judge:* This is a civil suit based upon the provisions of 45 U. S. C., §§ 1–16, commonly known as the Safety Appliance Acts. The case arose out of the operation of the State Belt Railroad, hereinafter referred to as the Belt Railroad, owned and operated by the State of California.

The cause was heard in the court below under a waiver of jury and on a stipulation of facts.

The Belt Railroad is about five miles in length. It receives from and delivers to common carriers engaged in interstate commerce railroad cars in interchange at San Francisco, switches cars to and from the wharves and industries there, and engages in the duties usually performed by terminal railroads.

On February 20, 1932, the Belt Railroad hauled over its line Western Pacific box car no. 16113. During the movement, the coupling and uncoupling apparatus on the "A" end of the car was out of repair and inoperative, as alleged in the appellee's complaint. thus necessitating that, in the language of the statute, men go between the ends of the cars in order to uncouple them.

The appellee contends that from the agreed statement of facts "there is no question but that the Safety Appliance Acts were violated had the Belt Railroad been privately owned and operated, and the question is whether by reason of its being owned and operated by the State of California any liability attaches to the State." In our view of the case, it is unnecessary for us to pass upon this contention.

It will be necessary for us to consider only one question, which, as phrased by the appellee, is as follows:

"Is the State of California suable in the District Court of the United States for a violation of the Safety Appliance Acts?"

In the court below, the appellant raised the question of jurisdiction by a "special appearance and demurrer", asserting that the District Court had no jurisdiction over the appellant, in that the controversy is one between the United States and a State and is there-

fore within the exclusive original jurisdiction of the Supreme Court of the United States.

The appellant's demurrer was overruled. The court below rendered judgment against the appellant and in favor of the appellee for $100 and costs.

In attacking the jurisdiction of the District Court, the appellant relies upon the provisions of 28 U. S. C. A., § 341, which in part reads as follows:

"The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party, except between a State and its citizens, or between a State and citizens of other States, or aliens, in which latter cases it shall have original, but not exclusive, jurisdiction."

This section is to be read in connection with article III, § ii, clause 2, of the Constitution, which is in part as follows:

"In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction."

Section 341 was first enacted by Congress as a part of section 13 of the Judiciary Act of 1789 (1 Stat. 73, 80–81). It was reenacted in its present form as section 687 of the Revised Statutes of 1873–1874, which section appears in the second edition of that compilation, published in 1878, at page 127.

On March 3, 1911, the same provision was again reenacted, without change, as section 233 of the Judicial Code. 36 Stat., pt. 1, 1156.

Finally, it was included in the United States Code of 1926, and there has been no change in its text since that time.

The appellee contends that this provision giving exclusive jurisdiction to the Supreme Court was repealed in part by the Safety Appliance Act, which was enacted in 1893 (27 Stat. 531, 532), amended in 1896 (29 Stat. 85), and again in 1903 (32 Stat., pt. 1, 943–944), and again in 1910 (36 Stat., pt. 1, 299). These enactments, it will be observed, all antedate the enactment of the Judicial Code in 1911, which vested in the Supreme Court exclusive jurisdiction of all actions in which a State is a party, with certain exceptions not involved here. It is clear, of course, that the latest enactment controls in case of a conflict between two enactments.

The appellee contends that section 13 of the Judiciary Act of 1789, as amended and revised (*supra*), giving exclusive jurisdiction to the Supreme Court, was repealed in part by the following jurisdictional provision, enacted in 1893, in the Safety Appliance Act:

"Any common carrier engaged in interstate commerce by railroad using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the preceding provisions of this chapter, shall be liable to a penalty of $100 for each and every such violation, to be recovered in a suit or suits to be brought by the United States district attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed; * * *"

Assuming that this section does repeal by implication those provisions of the then existing law giving exclusive jurisdiction to the Supreme Court (*supra*) where a State is a party, because inconsistent therewith, it is clear that the subsequent reenactment in 1911 (36 Stat. 1156) of the original act without change would for the same reason repeal the intermediate statutes of 1893 and 1896 (27 Stat. 531 and 29 Stat. 85), that is, because the earlier statute is inconsistent therewith.

In the foregoing discussion, we have assumed, for the sake of argument, that the Safety Appliance Acts of 1893 and 1896 by implication repealed the section of the Judiciary Act of 1789, giving exclusive jurisdiction to the Supreme Court over actions in which the State is a party.

A study of the statutes involved, however, discloses that no such implied repeal of the Judiciary Act was intended by Congress.

In the first place, it should be observed that the doctrine of supersession, or repeal by implication, is not favored by the courts. The very passage in Lewis' Sutherland Statutory Construction (2d ed.), vol. 1, § 247, pp. 464–465, cited by the appellee in support of its argument on this point, contains the statements that "The intention to repeal . . . will not be presumed, nor the effect of repeal admitted, unless the inconsistency is unavoidable, and only to the extent of the repugnance"; that "'The law does not favor a repeal of an older statute by a later one by mere implication'"; and that "Repeals by implication are not favored."

In *Great Northern Railway Co.* v. *United States* (C. C. A. 8), 155 F. 945, 960–961, affirmed, 208 U. S. 452, Judge Devanter, now a member of the Supreme Court, said:

". . . to establish a supersession or repeal of a statute by implication, it is not sufficient to show merely that a later statute, making no mention of the particular subject of the first, employs language broad enough to cover some part or all of it; for, as words are sometimes employed with less than their largest literal meaning, it must also appear that the two statutes cannot stand together, reasonable purpose and operation being accorded to each. [Many cases cited.] Or, as the same thing is at times differently expressed, a statute couched in clear and explicit terms is not overthrown by possible, but not necessary, implications flowing from after legislation."

See also *Gay* v. *Ruff*, 292 U. S. 25, 37; and *Knapp* v. *Byram*, 21 F. (2d) 226, 227.

Particularly is this true when the doctrine of implied repeal is invoked against the sovereign state.

In *United States* v. *Clausen* (D. C. Wash.), 291 F. 231, 238, transferred to the Supreme Court, by this court, 293 F. 195, writ of error dismissed, 266 U. S. 641, the District Court said:

"Under its war powers, Congress doubtless could confer upon a District Court authority to coerce a sovereign state and its officers, but that it so intended is not lightly to be concluded in the absence of positive and express congressional enactment, particularly so in view

of the provisions of section 233 of the Judicial Code (section 1210, Comp. Stats.) (28 U. S. C. A. 341, *supra*), which provides [here the court quoted the provision transcribed above]:

"This statute is controlling of this question, despite the fact that the present suit may not be purely a controversy of a civil nature. The dignified treatment and consideration due a soverign state form no small part of the reason that has actuated the lawmaking powers in making a State subject alone to the jurisdiction of the Supreme Court. An implied repeal of the law conferring, so far as the courts of the United States are concerned, exclusive jurisdiction on the Supreme Court of suits against a State, is not to be sanctioned, in view of the long-established recognition of this principle in the history of the doctrine of State's rights."

See also *United States* v. *McIntosh*, 57 F. (2d) 573, 580.

Applying the foregoing principles to the statutes that we are now considering, we find various grounds for concluding that Congress intended no implied repeal of the Judiciary Act and the Revised Statutes, insofar as the exclusive jurisdiction of the Supreme Court is concerned, when the Safety Appliance Acts were passed.

In the first place, the last-named statutes apply in terms only to "any common carrier engaged in interstate commerce." The Supreme Court has already adjudicated that the operation of the Belt Railroad involved in the instant case has not caused the State of California to become a common carrier. In *Sherman* v. *United States*, 282 U. S. 25, 29, Mr. Justice Holmes said:

"California has not gone into business generally as a common carrier, but simply has constructed the Belt Line as an incident of its control of the harbor—a State prerogative."

Obviously, the Safety Appliance Acts, which vest jurisdiction in the District Courts and which are made specifically applicable to common carriers, cannot be construed—as to a State that has been held not to be a common carrier—as repealing prior statutes giving the Supreme Court exclusive jurisdiction over controversies where the State is a party.

In an effort to escape from the effect of the *Sherman case*, *supra*, on the question of "State prerogative", the appellee seeks to distinguish between "State prerogative" and "State soverignty." As we read the authorities, the distinction is without a difference as far as the question now before us is concerned. *Aetna Co.* v. *Bramwell*, 12 F. (2d) 307, 309; *Words and Phrases* (1st ed.) vol. 6, p. 5518; *Bouvier* (3d Rev.) vol. 3, p. 2670.

Furthermore, there is abundant authority for the proposition that a statute should not be construed to apply against the sovereign unless the enactment refers to the soverign in specific terms.

In *Savings Bank* v. *United States*, 86 U. S. 227, 239, the court said:

"It is a familiar principle that the King is not bound by any act of Parliament unless he be named therein by special and particular words. The most general words that can be devised (for example, any person or persons, bodies politic or corporate) affect not him in the least, if they may tend to restrain or diminish any of his rights

and interests. He may even take the benefit of any particular act, though not named. The rule thus settled respecting the British Crown is equally applicable to this government, and it has been applied frequently in the different States, and practically in the Federal courts. It may be considered as settled that so much of the royal prerogatives as belonged to the King in his capacity of *parens patriae*, or universal trustee, enters as much into our political state as it does into the principles of the British constitution."

See also, *United States* v. *Herron*, 87 U. S. 251, 257, 263; *Guarantee Co.* v. *Title Guaranty Co.*, 224 U. S. 152, 155; *In re Fowble*, 213 F. 676, 679–680; *Villere* v. *United States* (C. C. A. 5), 18 F. (2d) 409, certiorari denied, 275 U. S. 532; *Wechsler* v. *United States* (C. C. A. 3), 27 F. (2d) 850, 851.

The appellee seeks to escape the application of the foregoing doctrine by contending that "The principle that a sovereign is not brought within the terms of a statute unless named therein applies only to the enacting sovereign."

We cannot agree with this view. In *United States* v. *Hoar*, 26 Fed. Cas. 329, 330, No. 15,373, Mr. Justice Story had before him the sole question of "whether the United States are barred of their suit by the statutes of limitations of Massachusetts." The learned jurist there said:

"Now, I think, it may be laid down as a safe proposition, that no statute of limitations has been held to apply to actions brought by the crown, unless there has been an express provision including it. For it is said, that, where a statute is general, and thereby any prerogative, right, title, or interest is divested or taken from the king, in such case the king shall not be bound, unless the statute is made by express words to extend to him.

* * * * * * *

"But independently of any doctrine founded on the notion of prerogative, the same construction of statutes of this sort ought to prevail, founded upon the legislative intention. Where the Government is not expressly or by necessary implication included, it ought to be clear from the nature of the mischiefs to be redressed, or the language used, that the Government itself was in contemplation of the legislature, before a court of law would be authorized to put such an interpretation upon any statute. In general, acts of the legislature are meant to regulate and direct the acts and rights of citizens; and in most cases the reasoning applicable to them applies with very different, and often contrary force to the Government itself. It appears to me, therefore, to be a safe rule founded in the principles of the common law, that the general words of a statute ought not to include the Government, or affect its rights, unless that construction be clear and indisputable upon the text of the act."

The greater part of the second paragraph of the foregoing excerpt was quoted with approval by Mr. Chief Justice Fuller in *Stanley* v. *Schwalby*, 147 U. S. 508, 515.

Again, in *New York* v. *Irving Trust Co.*, 288 U. S. 329, 331, the Supreme Court, having before it § 57 (n) of the Bankruptcy Act, said:

"It is admitted here, that as the United States and the States are not mentioned in the limitation of § 57, they are not bound thereby."

The final question to be determined is whether the suit before us is of "a civil nature."

We need not dwell on this point, since the appellee admits that "this is a civil suit", and the repeated decisions of the Supreme Court and other Federal courts leave the matter beyond a peradventure of a doubt.

In *C., B. & Q. Ry.* v. *United States*, 220 U. S. 559, 577–578, the Supreme Court had before it the same statutes that we are here considering. In that case, Mr. Justice Harlan said:

"In effect, the contention is that the present action for a penalty is a criminal prosecution, and that the defendant cannot be held guilty of a crime when it had no thought or purpose to commit a crime, and endeavored with due diligence to obey the act of Congress. This contention is unsound, because the present action is a civil one. It is settled law that 'a certain sum, or a sum which can readily be reduced to a certainty, prescribed in a statute as a penalty for the violation of law, may be recovered by civil action, even if it may also be recovered in a proceeding which is technically criminal'."

See also, *United States* v. *Regan*, 232 U. S. 37, 48; *United States* v. *C., B. & Q. R. R.*, 237 U. S. 410, 411, 413; *United States* v. *Louisville & Nashville R. Co.* (C. C. A. 6) 167 F. 306, 308; *United States* v. *Illinois Cent. R. Co.* (C. C. A. 6) 170 F. 542, 544–545; *United States* v. *Atlantic Coast Line R. Co.*, 182 F. 284, 285; *United States* v. *Minneapolis, St. P. & S. S. M. Ry. Co.*, 235 F. 951, 952–3.

Accordingly, we hold that the court below erred in overruling the demurrer filed by the appellant, and in assuming jurisdiction of the cause.

Judgment reversed, and the District Court is directed to dismiss the action.

(Endorsed): Opinion. Filed Jan. 28, 1935. Paul P. O'Brien, clerk.

United States Circuit Court of Appeals for the Ninth Circuit

No. 7436

THE STATE OF CALIFORNIA, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

Upon appeal from the District Court of the United States for the Northern District of California, Southern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern

District of California, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said District Court in this cause be, and hereby is, reversed, with directions to said District Court to dismiss the action.

(Endorsed:) Judgment. Filed and entered January 28, 1935. Paul P. O'Brien, clerk.

Certificate of clerk U. S. Circuit Court of Appeals for the Ninth Circuit to record certified under rule 38 of the revised rules of the Supreme Court of the United States

I, Paul P. O'Brien, as clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing sixty-one (61) pages, numbered from and including 1 to and including 61 to be a full, true, and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of Honorable Stanley Reed, Solicitor General of the United States, of counsel for the appellant, and certified under rule 38 of the revised rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, in the State of California, this 18th day of April A. D. 1935.

[SEAL] PAUL P. O'BRIEN, *Clerk.*

U. S. GOVERNMENT PRINTING OFFICE: 1935

Supreme Court of the United States

Order allowing certiorari

Filed October 14, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.